

FORWARD HALATA CHAUKE

versus

THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J.
MASVINGO, 25TH and 26th February, 2021

Criminal – Bail Pending Appeal

K. Chuma, for the applicant
Ms M. Mutumhe for respondent

MAWADZE J: This is an application for bail being appeal.

The applicant was convicted of two counts by the Magistrate sitting at Chiredzi on 14 December, 2020.

In count 1 which relates to contravening s 59(2)(b) of the Parks and Wildlife, Act [*Cap 20:14*] the 26 year old applicant was sentenced to pay a fine of \$1000 or in default of payment to serve 5 months imprisonment.

In count 2 which relates to contravening s 80(1) of SI 362/90 as read with s 128(b) of the Parks and Wild Life, Act [*Cap 20:14*] the applicant was sentenced to the minimum mandatory sentence of 9 years imprisonment.

In terms of s 59(2) (b) of the Parks and Wildlife, Act [*Cap 20:14*] it is an offence to remove any animal or any part of an animal from any land or from one place to another unless one has been issued with a permit to do so by the appropriate authority allowing such removal. In specific

terms the charge in count 1 is that on 18 September, 2020 and at Muhlava Village, Headman Gezani, Chief Sengwe, Chiredzi the applicant removed 4 leopard canine teeth and a pair of Nyala horns without a permit and kept them at his homestead.

In count 2 contravening s 82(1) of S.I. 362/90 as read with S.I. 28(b) of the Parks and Wild Life, Act [*Cap 20:14*] relates to unlawful possession of ivory. It is said on the same date and place in count 1 the applicant unlawfully possessed 0.76 kg of raw ivory.

The facts upon which the applicant was convicted and sentenced can be summarised as follows;

On 9 September 2020 police Detectives in Chiredzi received information to the effect that the applicant was in possession of raw ivory at his residence which he was offering for sale. As a result they teamed up with Game Rangers and Parks and Wild Life officials in order to raid the applicant's residence. They all approached the applicant's homestead around midnight. The applicant's homestead comprises of just one hut. A search was conducted and two Nyala horns were recovered from the applicant's hut. A further search yielded the recovery of raw ivory and 4 canine leopard teeth all wrapped in a blue plastic hidden on the roof of the applicant's thatched hut.

During the trial the applicant offered a partial plea to count 1. He admitted that he was in possession of two Nyala horns which were found inside his hut.

In respect of count 2 the applicant vehemently denied possessing either the 4 canine leopard teeth or the raw ivory. Instead he said these items were recovered from the homestead of his neighbour, one Timothy Mandongwe. The applicant confirmed that they were wrapped in a plastic paper and were on top of the thatched hut. He however said that this was at his neighbour's homestead. The applicant said for inexplicable reasons the 4 canine leopard teeth and the raw ivory were "planted" by police Detectives on him. This is the position the applicant maintained throughout the trial.

In his defence case the applicant said he is baffled as to why the 4 canine teeth of the leopard and the raw ivory found allegedly at his neighbour's residence was being "planted" on him. The applicant confirmed that all the persons who came to search his residence were strangers to him.

In a bid to buttress his case the applicant called his wife one Alice Chauke as a defence witness. The sum total of his wife's testimony is that only the two Nyala horns were recovered at their residence. She said the raw ivory was found at their neighbour's residence some 30m away from their residence but was "planted" on the applicant because police failed to locate their neighbour.

The State led evidence from two witnesses a CID detail one Tonderai Chakanyuka of the Minerals, Flora and Fauna Unit and Promise Kamuka a game ranger at Gonarezhou National Park who was part of the team which approached the applicant's residence.

The police detail explained why they proceeded to applicant's residence who was said to be selling raw ivory. The police teamed up with 4 game rangers and an officer from the Parks and Wild Life Department.

The evidence of the two state witnesses in material terms was as follows;

- (i) They approached the applicant's residence around midnight and identified themselves after which they explained the purpose of their nocturnal visit.
- (ii) they asked to search applicant's hut after he denied possessing raw ivory and applicant consented to the search
- (iii) Inside applicant's single hut they recovered firstly a pair of Nyala horns behind a cupboard in a card board box. This is not refuted by the applicant.
- (iv) Outside the same hut on the thatched roof they saw a plastic bag which they asked applicant to take. Inside that plastic bag they recovered 4 leopard teeth and raw ivory in issue
- (v) The recovered 4 leopard teeth and raw ivory were later examined and confirmed as such by a Veterinary Officer
- (vi) They denied searching any other homestead except applicant's residence which comprised of just one hut.

In his address to the court *Mr Chuma* for the applicant rightly conceded that once the appeal against conviction fails there is no legal or factual basis to challenge the sentence imposed by the court *a quo* in both counts. As a result no useful purpose would be achieved by referring to the grounds of appeal in respect of sentence.

The single ground of appeal in respect of conviction is a factual one, which is that the raw ivory and 4 canine leopard teeth were not found at the applicant's residence but at his neighbour's homestead.

The law in respect of bail pending appeal is a well beaten or trodden path. For emphasis and clarity I shall simply highlight important aspects.

Firstly, at this stage the presumption of innocence which an accused enjoys before conviction would have fallen away.

Secondly, the applicant or accused person therefore bears the onus of proof to show on a balance of probabilities that it is in the interest of justice for him or her to be released on bail pending appeal (despite the conviction and or sentence).

Thirdly in deciding whether to admit an applicant to bail pending appeal the court considers mainly two factors, which are;

- (a) The prospects of success on appeal
- (b) Risk of abscondment

See *State v Shambare & 3 Ors* HH 65/18; *Aubrey Cummings v State* HMA 33/17; *Peter Chikumba v State* HH 724/15.

It needs no emphasis that the risk of abscondment is always high where there are no prospects of success on appeal.

What constitutes prospects of success on appeal was succinctly explained by my brother MAFUSIRE J. in *Peter Chikumba* case *supra* in which he said it relates to whether an applicant "has a fighting chance" on appeal. Put differently, the issue is whether an applicant has an arguable case on appeal. If an appeal is doomed to fail surely there is no basis to admit an applicant to bail pending appeal.

I am constrained to appreciate the applicant's ground of appeal in respect of conviction in this case.

The only reason why the police approached his residence was a result of the tip off they had received. The applicant was a stranger to them. As per applicant's own admission he was advised of the purpose of their visit and search. Indeed the applicant concedes two Nyala horns were recovered in his hut. It would be clearly illogical for the police to exonerate the person from

whom the raw ivory and 4 leopard teeth were recovered and to then inexplicably incriminate the applicant. The applicant was at pains to find such a reason.

The evidence of the applicant's wife rightly rejected. She has a motive to try and protect her husband. On the other hand the State witnesses materially corroborated each other on what transpired at the applicant's homestead. Their credibility is beyond reproach.

It is therefore my considered view that the applicant has virtually "no fighting chance" on appeal. The appeal in respect of conviction is doomed to predictable failure. It is simply a fishing expedition or testing the waters as it were. Consequently the application for bail pending appeal cannot succeed.

IT IS ORDERED THAT;

The application for bail pending appeal be and is hereby dismissed.

Chuma, Gurajena & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners